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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JAMES R. JACKSON, individually and as administrator of the estates of **Sandra A. Jackson**, deceased, and **Baby Boy Jackson**, deceased,

Petitioner,

v.

CITY OF JOLIET, et al.,

Respondents.

VELVA ROSS, individually and as administrator of the estate of **Jerry D. Ross, Jr.**, deceased,

Petitioner,

v.

CITY OF JOLIET, et al.,

Respondents.

VELVA ROSS, individually and as administrator of the estate of **Jerry D. Ross, Jr.**, deceased,

Petitioner,

v.

COUNTY OF WILL, a municipal corporation, and **ROBERT TEZAK**, Will County Coroner,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

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QUESTIONS PRESENTED

1. Whether a reckless deprivation of life or liberty violates substantive due process.
2. Whether the lack of an adequate state remedy after a deprivation of life or liberty violates procedural due process.
3. Whether reckless performance of governmental services after performance begins violates due process.

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IN THE
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**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

Petitioners respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in favor of respondents on August 23, 1983.

OPINIONS BELOW

The opinion of the court below dated August 23, 1983, is reported at 715 F.2d 1200 (CA 7 1983), and appears in the Appendix at 1a-11a. The August 23, 1982 orders of the United States District Court for the Northern District of Illinois, Eastern Division, have not been reported and appear in the Appendix at 12a-13a.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on August 23, 1983 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983 (Supp. IV 1980)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

These two consolidated cases were before the court below on an interlocutory appeal, by the respondents, of the District Court's denial of their motions to dismiss petitioners' complaints for failure to state causes of action under 42 U.S.C. § 1983.

Petitioners' complaints alleged essentially the same facts which, in the present procedural posture, are taken as true and indicate that petitioners' decedents were killed as a result of respondents' reckless conduct.

On November 21, 1980, Jerry D. Ross, Jr., Sandra A. Jackson and her unborn infant, Baby Boy Jackson, died of smoke inhalation while they were seated in a car which had been caused to leave the roadway. At approximately 9:37 p.m., that night, respondent Taylor, a City of Joliet police officer, came upon that car. Its engine was running, its lamps were lit, and its wheels were spinning. Taylor either knew the petitioners' decedents were in the car, or, recklessly failed to discover their presence. He reported the car, allegedly on fire, to the City of Joliet Fire Department. He then left the scene without making any attempt to remove the occupants, call for an ambulance or even inform the Fire Department that the car was occupied. Taylor then took up a position to divert civilian traffic which might have passed by the car and stopped to help its occupants.

At 9:48 p.m., Joliet firemen, respondents Horn, Speaker, Tatro, Walsh and Morris, arrived at the scene, quashed the alleged fire and for another thirty-one minutes, remained at the scene, again without calling for medical help or removing anyone from the car.

At 10:26 p.m., a Joliet ambulance arrived, removed Jackson from the car, rendered aid to her and then trans-

ported her to the hospital where she and her fetus died at 10:55 p.m., one hour and eighteen minutes after the car was first discovered.

Throughout this entire period, no attempt was made to render aid to Ross who was still alive; on the contrary, slumped over the wheel of the car, he was left in the vehicle, and was finally removed by the tow-truck driver called by the police department to remove the car. From 9:37 p.m., until his death at 11:45 p.m., no aid whatsoever was rendered to Ross even though the girl was found alive and transported to the hospital.

At the time, there was a regulation promulgated by respondent, Will County, and its coroner, respondent Tezak, which instructed government personnel not to touch persons they presumed to be dead. This regulation was adopted by Joliet and its supervisory personnel, respondents Breen and Walsh, who ordered their personnel to implement that regulation even though the personnel were untrained in the means of determining death. Acting under this regulation, the personnel at the scene made no attempt to save Ross because he was erroneously presumed to be dead.

All respondents filed motions to dismiss the complaints for failure to state causes of action under 42 U.S.C. § 1983. The sufficiency of the pendent state claims was not challenged. The District Court denied the motions to dismiss and an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), was taken. The Court of Appeals reversed and remanded the cases for dismissal for failure to state federal claims. In so ordering, the court rejected petitioners' arguments that the respondents had violated the decedents' substantive due process right to life and liberty under the Fourteenth Amendment, and procedural due process right under the Fourteenth Amendment.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF THE FOURTEENTH AMENDMENT.

Two and a half years ago, this Court in *Parratt v. Taylor*, 451 U.S. 321 (1981), held that there is no state-of-mind requirement under § 1983, and thus concluded that a negligent deprivation of property under color of law would violate due process if there is no adequate post-deprivation state remedy for the random and unauthorized acts. However, "[t]he courts that have attempted to implement the *Parratt* decision, have thus far been unable to reach a consensus as to the full meaning and reach of the decision." *Daniels v. Twin Oaks Nursing Home*, 692 F.2d 1321, 1330 n.3 (CA 11 1982).

A. The Decision Below Conflicts With The Decisions Of This Court And Other Courts Of Appeals On The Issue Of Whether Reckless Deprivations Of Life Or Liberty Can Constitute Violations Of Due Process.

Based on *Parratt*, the circuits are split on the issue of whether negligent or reckless deprivations of life or liberty can constitute violations of due process. *Hull v. City of Duncanville*, 678 F.2d 582, 585 (CA 5 1982), and the Seventh Circuit in its opinion in the instant case, held that such inaction is not actionable. Other circuits do not agree. *Clark v. Taylor*, 710 F.2d 4, 10-11 (CA 1 1983); *Doe v. New York City Dept. of Social Services*, 709 F.2d 782, 787 (CA 2 1983); *Avery v. County of Burke*, 660 F.2d 111, 114 (CA 4 1981); *Herrera v. Valentine*, 653 F.2d 1220,

1225 (CA 8 1981); *Hirst v. Gertzen*, 676 F.2d 1252, 1265 (CA 9 1982); *Morrison v. Washington County, Alabama*, 700 F.2d 678, 682-83 (CA 11 1983).

The holding below also conflicts with decisions of this Court on this issue. In *Smith v. Wade*, U.S., 103 S.Ct. 1625 (1983), this Court held that punitive, as well as compensatory damages, are awardable for a reckless deprivation of plaintiff's constitutional rights. Also, in a procedural due process context, this Court held in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), that when it is the governmental system itself and not an individual actor that destroys a person's due process interests, it is irrelevant whether the action is taken through "negligence, maliciousness, or otherwise". *Id.* at 436. In this case, it was the Will County regulation as applied that destroyed Ross' due process interests. Accordingly, the state of mind of the respondents Will County and Tezak are irrelevant to the due process analysis. Instead, all that is required to state a claim for a due process violation is that "established state procedure" destroyed the decedents' rights without according them proper procedural safeguards. *Id.* at 436. Thus, under this procedural due process analysis, the question of the adequacy of the state remedy may well be determinative.

In the instant case, petitioners raised in the Court of Appeals the fact that there is no adequate state remedy because the respondent police officers and firemen are all conferred with absolute immunity from liability. Ill.Rev.Stat.1981, ch. 85, ¶ 4-102; ¶ 5-103(b) (see Appendix at 14a). In spite of this, the Court of Appeals ruled against petitioners.

B. The Circuits Are Split On The Issue Of Whether The Lack Of An Adequate State Remedy After A Deprivation Of Life Or Liberty Violates Procedural Due Process.

The circuits are split on the issue of whether adequate state remedies are relevant to cases involving life or liberty interests or substantive due process.¹ For example, the Ninth Circuit in *Rutledge v. Arizona Board of Regents*, 660 F.2d 1345, 1352 (CA 9 1981), read *Parratt* to mean that the availability of a state tort remedy for assault and battery prevents the victim from being deprived of his "liberty" within the meaning of the Fourteenth Amendment. Thus, in that Circuit, the traditional distinction between substantive due process and procedural due process has been blurred and the holding in *Monroe v. Pape*, 365 U.S. 167 (1961), that the availability of state tort remedies is irrelevant to substantive "liberty" deprivations, can no longer be considered good law in that Circuit. See also *Haygood v. Younger*, No. 81-4686 (CA 9 Oct. 25, 1983) and the cases it collected.

The Seventh Circuit has taken the same approach in *Ellis v. Hamilton*, 669 F.2d 510, 515 (CA 7 1982), by holding that an adequate state remedy would prevent a deprivation of life or liberty under the due process clause. See also *Flower Cab Co. v. Petite*, 685 F.2d 192, 193 (CA 7 1982). On the other hand, the Fifth Circuit has held *Parratt* inapplicable to substantive due process (*Duncan v. Poythress*, 657 F.2d 691, 704-05 (CA 5 1981)), and deprivations of liberty. *Brewer v. Blackwell*, 692 F.2d 387, 394-95 (CA 5 1982).

¹ Petitioners raised this issue in the Court of Appeals but the court failed to address it. However, a holding for Petitioners on the basis of the lower court's decision may place this issue squarely before this Court.

C. The Decision Below Conflicts With The Decision Of Another Court Of Appeals On The Issue Of Whether Reckless Performance Of Governmental Services After Performance Begins Violates Due Process.

The lower court's holding that a municipality can never be liable for reckless performance of governmental services after performance begins (715 F.2d at 1205) conflicts with the decision of another Court of Appeals. In *Morrison v. Washington County, Alabama*, 700 F.2d 678 (CA 11 1983), the defendant county hospital had begun its treatment of plaintiff. Subsequently, plaintiff was discharged because the hospital "took no action". *Id.* at 682. The trial court granted the hospital summary judgment on the § 1983 count and the Court of Appeals reversed. Under the reasoning of the court below in the instant case, summary judgment for the hospital in *Morrison* should have been sustained because:

it is essentially inaction; and it was remote from the concerns of the framers of the Fourteenth Amendment. Although there are many hazards of which the framers of the Fourteenth Amendment and the Civil Rights Act of 1871 could not have been aware, fire—a greater hazard in the nineteenth century than it is today—and accidents, and careless policemen, careless firemen and careless medical workers, are not among them. What happened in this case is not the kind of thing that the framers were not concerned about because they could not foresee but the kind of thing they knew about and surely did not think required a federal tort remedy to prevent.

Id. at 1205. See also *Wright v. City of Ozark*, 715 F.2d 1513, 1515-16 (CA 11 1983). A clear split in the Circuits exists.

These conflicts justify the grant of certiorari to review the judgment below.

II.

THIS CASE INVOLVES IMPORTANT QUESTIONS NEEDING RESOLUTION BY THIS COURT.

§ 1983 cases are an important and large part of the federal case load. The questions presented by this case are being addressed constantly by federal courts and a tremendous amount of judicial resources are being spent on analyzing divergent opinions in the circuits on these issues. Only a decision by this Court will restore uniformity and prevent the address of the courthouse from being the determinative factor in the outcome of a § 1983 case.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 82-2833

JAMES R. JACKSON, individually and as administrator of the
estates of Sandra A. Jackson, deceased, and Baby Boy
Jackson, deceased,

Plaintiff-Appellee,

v.

CITY OF JOLIET, et al.,

Defendants-Appellants.

No. 82-2834

VELVA ROSS, individually and as administrator of the estate of
Jerry D. Ross, Jr., deceased,

Plaintiff-Appellee,

v.

CITY OF JOLIET, et al.,

Defendants-Appellants.

No. 82-2835

VELVA ROSS, individually and as administrator of the estate of
Jerry D. Ross, Jr., deceased,

Plaintiff-Appellee,

v.

COUNTY OF WILL, a municipal corporation, and ROBERT TEZAK,
Will County Coroner,

Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
Nos. 81 C 6518, 81 C 6519—Joseph Sam Perry, Judge.

ARGUED MAY 26, 1983—DECIDED AUGUST 23, 1983

Before POSNER and COFFEY, *Circuit Judges*, and WYATT, *Senior District Judge*.*

POSNER, *Circuit Judge*. No problem so perplexes the federal courts today as determining the outer bounds of section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, the ubiquitous tort remedy for deprivations of rights secured by federal law (primarily the Fourteenth Amendment) by persons acting under color of state law. In the present cases, which are before us on interlocutory appeal under 28 U.S.C. § 1292(b) from denial of the defendants' motions to dismiss the complaints for failure to state a claim, see Fed. R. Civ. P. 12(b)(6), the specific question is whether the negligent failure of local public-safety workers to save the occupants of a burning automobile is actionable under section 1983 as a deprivation of life without due process of law.

The procedural posture of the cases requires us to take as true the facts alleged in the complaints. On November 21, 1980, at about 9:35 p.m., Jerry Ross, age 17, accompanied by Sandra Jackson, age 16, and six months pregnant, was driving on a road in Joliet, Illinois, when the car swerved off the road for unknown reasons, crashed, and burst into flames. Two minutes later a Joliet policeman, defendant Taylor, chanced on the scene. Although the car's wheels were spinning, its lights were on, its motor was running, and it was burning, Taylor made no attempt to determine whether it was occupied and did not call an ambulance. He did call the fire department (at 9:40) and he then returned to the road and directed traffic away from the scene of the accident. Five Joliet firemen, also defendants, arrived eight minutes later. At 10:19, having put out the fire, they first noticed Ross and Jackson slumped in the front seat of the car. They made no attempt to remove or assist either one but they did call an ambulance, which arrived at 10:26. The firemen and

* Hon. Inzer B. Wyatt of the Southern District of New York, sitting by designation.

ambulance paramedics thought Ross dead and left him in the car, but they removed Sandra Jackson alive and took her to a hospital. She was admitted at 10:40 and pronounced dead, along with her fetus, at 10:55. Ross was later removed from his car by a tow-truck driver and pronounced dead by the county coroner (also a defendant) when the coroner arrived at 11:45.

The plaintiffs (representing Ross, Jackson, and the fetus) allege that their decedents would have been saved if Taylor had aided the occupants of the burning car, or called an ambulance, or at least not directed traffic in a way that prevented other potential rescuers from saving them, or if the firemen had discovered the car was occupied before the fire was put out or at least had aided the occupants then. The coroner is a defendant in Ross's suit because he had issued a directive that no nonsupervisory personnel (such as the firemen who discovered Ross) were to touch a corpse unless someone from his office was present, and Ross may have been alive when they discovered him. The city's police and fire chiefs, and the city and county themselves, are additional defendants, but we shall not have to consider their liability separately, or decide whether a section 1983 suit can be maintained on behalf of a deceased six-month-old fetus. The complaints also contain pendent claims under state tort law but the plaintiffs concede as they must that if their section 1983 claims are dismissed on the pleadings the pendent claims should also be dismissed. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

Although the complaints are liberally sprinkled with words like "recklessly" and "knowingly," it is apparent and was admitted by the plaintiffs' counsel at oral argument that the plaintiffs do not believe that any of the defendants wanted to injure or kill the plaintiffs' decedents or could be charged with homicide, manslaughter, or some other crime or even with an intentional tort such as battery. It would be a different case if intentional misconduct were alleged; we may assume that if officer Taylor, knowing the car was occupied and wanting the occupants to be burned to death, directed traffic

away from the scene in order to prevent any passing driver from saving them, he would be liable under section 1983 for having under color of the city ordinance making him a public officer deprived the plaintiffs' decedents of their lives without due process of law. See *Brazier v. Cherry*, 293 F.2d 401, 404-05 (5th Cir. 1961); cf. *State Bank v. Camic*, No. 82-2781, slip op. 13 (7th Cir. July 13, 1983). But all that the complaints in fact allege are that Taylor, negligently—at worst, grossly so—failed to save anyone who might be trapped in the burning car and prevented other motorists from doing so; that likewise the firemen, through negligence or gross negligence, failed to rescue the plaintiffs' decedents from the burning car or to assist them after the fire was put out; and that the coroner had issued a foolish rule which prevented the firemen and paramedics, who were not competent to determine without touching Ross whether he was dead, from aiding him while he may still have been alive.

Now there is of course no general common law duty to rescue a stranger in distress even if the rescue can be accomplished at no cost to the rescuer. See, e.g., *Yania v. Bigan*, 397 Pa. 316, 155 A.2d 343 (1959). And although circumstances can create such a duty, see, e.g., *DePue v. Flateau*, 100 Minn. 299, 111 N.W. 1 (1907); *Hutchinson v. Dickie*, 162 F.2d 103 (9th Cir. 1947), a mere failure to rescue is not tortious just because the defendant is a public officer whose official duties include aiding people in distress. *Warren v. District of Columbia*, 444 A.2d 1, 3-9 (D.C. Ct. App. 1981); *Williams v. California*, 44 Cal. 3d 18, 664 P.2d 137 (1983). But if you do begin to rescue someone you must complete the rescue in a nonnegligent fashion even though you had no duty of rescue in the first place. See, e.g., *Cross v. Wells Fargo Alarm Services*, 82 Ill. 2d 313, 317, 412 N.E.2d 472, 474 (1980); *Farwell v. Keaton*, 396 Mich. 281, 240 N.W.2d 217 (1976); Restatement (Second) of Torts § 323 (1965). The rationale is that other potential rescuers (if any) will be less likely to assist if they see that someone is already at the scene giving aid. See, e.g., *United States v. Lawter*, 219 F.2d 559, 562 (5th Cir. 1955). This rationale is strained in some cases, cf. Re-

statement, *supra*, § 323, comment e; Prosser, Handbook of the Law of Torts 347-48 (4th ed. 1971), but not here: with a policeman and firemen at the scene of the accident, no motorist was likely to assist the occupants of Ross's burning car—especially when the police officer was directing them away from the scene.

But even if the complaints state good claims under general tort principles, it does not follow that they state good claims under section 1983 just because the defendants are public officers. See, e.g., *Street v. Surdyka*, 492 F.2d 369, 371 (4th Cir. 1974); *Williams v. Thomas*, 692 F.2d 1032, 1035 (5th Cir. 1982). Section 1983 provides a remedy only for violations of federal law. Although the complaints allege violations of both the equal protection and due process clauses of the Fourteenth Amendment, they clearly state no claims under the former. If the defendants had withheld protection from the plaintiffs' decedents because they were blacks or members of some other vulnerable minority—if the defendants were discriminating in a vicious or irrational fashion—there would be an equal protection issue. See *Smith v. Ross*, 482 F.2d 33, 36-37 (6th Cir. 1973) (per curiam). But only deliberate discrimination violates equal protection, *Shango v. Jurich*, 681 F.2d 1091, 1104 (7th Cir. 1982), and is not alleged in this case. The defendants did not know that anyone, alive or dead, was in the car until they put out the fire. They certainly did not know whether there was anyone belonging to a group to which they were hostile.

If the plaintiffs have a claim it is under the Fourteenth Amendment's due process clause, which forbids the state to deprive anyone of life, liberty, or property without due process of law. There are two ways in which the complaints might be thought to allege a violation of the due process clause. First, it could be argued that the liberties secured by the clause include not only the traditional negative liberties—the right to be let alone, in its various forms—but also certain positive liberties, including the right to receive the elementary protective services that the state routinely provides users of its highways. If so,

and a state officer deprives a person of such a liberty and death ensues as a proximate result, damages for that death could be recovered under section 1983.

The problem with this argument is that the Constitution is a charter of negative rather than positive liberties. *Harris v. McRae*, 448 U.S. 297, 318 (1980); *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982). The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services. Of course, even in the laissez-faire era only anarchists thought the state should not provide the type of protective services at issue in this case. But no one thought federal constitutional guarantees or federal tort remedies necessary to prod the states to provide the services that everyone wanted provided. The concern was that some states might provide those services to all but blacks, and the equal protection clause prevents that kind of discrimination.

The modern expansion of government has led to proposals for reinterpreting the Fourteenth Amendment to guarantee the provision of basic services such as education, poor relief, and, presumably, police protection, even if they are not being withheld discriminatorily. See, e.g., Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L. Rev. 7 (1979). To adopt these proposals, however, would be more than an extension of traditional conceptions of the due process clause. It would turn the clause on its head. It would change it from a protection against coercion by state government to a command that the state use its taxing power to coerce some of its citizens to provide services to others. The Supreme Court has refused to go so far, see, e.g., *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973), except where indigence prevents an individual (a criminal defendant in particular) from protecting himself against coercion by the state.

See, e.g., *Griffin v. Illinois*, 351 U.S. 12 (1956). Whether the Court has refused because a guarantee of basic service cannot easily be squared with the text or intellectual ambience of the Fourteenth Amendment or because judges lack objective criteria for specifying minimum levels of public services or are reluctant to interfere with the public finance of the states need not trouble us. It is enough to note that, as currently understood, the concept of liberty in the Fourteenth Amendment does not include a right to basic services, whether competently provided or otherwise.

But the plaintiffs have another argument: The Fourteenth Amendment forbids a state to deprive anyone of his life without due process of law; to deprive a person of his life through negligence is the antithesis of due process; therefore the complaints state a cause of action under section 1983. This argument would succeed if the defendants had killed the plaintiffs' decedents in circumstances making the killing an intentional tort. But the reason it would succeed is not the syllogism that the plaintiffs press on us; it is history. The due process clause was intended to protect the recently liberated blacks from official oppression, and because it was decided not to write the clause in racial terms, to protect everyone else besides. If due process is not provided, it makes no difference whether the state hangs you or has you shot down in the street by a police officer. Section 1983 has been read to take the command of the due process clause one step further by imposing liability on officers acting under color of, though contrary to, state law. But the concern is with the use of state-created power to kill rather than with the state's failing to prevent death. Ross's car ran off the road and burst into flames for reasons unrelated to the actions of any state officer. The plaintiffs' claim is not that the defendants tried to harm the occupants of the car but that they failed to help them. But the difference between harming and failing to help is just the difference noted earlier between negative liberty—being let alone by the state—and positive liberty—being helped by the state. To accept the plaintiffs' syl-

logism would be to impose by another route a duty to provide basic services. Here the state acted promptly but, it is alleged, ineffectually. The next case if this one succeeds will be one where the police and fire departments, maybe because of budget cuts, do not arrive at the scene of the accident at all.

True, that would be a case of pure, or at least purer, inaction, a case where the defendants had not made the plaintiffs' decedents worse off but simply had failed to make them better off. In the present case, because rescue efforts were begun, the defendants may have made the plaintiffs worse off; if they had done nothing, maybe some passing motorist would have stopped and pulled the plaintiffs' decedents out of the burning car before it was too late. Maybe therefore this case is like *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979), where the police arrested a driver and left his child passengers stranded in a driverless car, thus putting the children in a situation of peril for the consequences of which the police were held liable under section 1983; or like the cases that hold jailers liable for injuries resulting from deliberate indifference to the medical needs of their prisoners, as in *Wood v. Worachek*, 618 F.2d 1225, 1233 (7th Cir. 1980), or from assaults by other inmates, as in *Spence v. Staras*, 507 F.2d 554, 557 (7th Cir. 1974). But such cases are distinguishable from this one. In *White v. Rochford* the arrest created the danger to the children; here the plaintiffs' decedents were in great danger before the defendants appeared. In the prisoner cases too, it was the state that put the plaintiff in a place of potential danger. This case is closer to *Bowers v. DeVito*, *supra*, where the state officers did not create but merely failed to avert danger, by negligently releasing from custody a dangerous lunatic who then killed the plaintiff's decedent; and to *Hall v. City of Duncanville*, 678 F.2d 582 (5th Cir. 1982), where the city's negligent failure to enforce the speed limit at a railroad crossing resulted in the plaintiff's being seriously injured in a crossing accident. See also *Reiff v. City of Philadelphia*, 471 F. Supp. 1262, 1266 (E.D. Pa. 1979).

In none of these cases was the defendants' conduct actionable under section 1983.

Although in theory, as suggested earlier, a botched rescue could make the objects of the rescue attempt worse off than if the attempt had not been made, that was also true in *Bowers*, *Hull*, and *Reiff*. In *Hull*, for example, the plaintiff might have taken more care at the crossing if he had known that the city was not enforcing the speed limit. The probability that the conduct of the defendants in this case actually made the plaintiffs' decedents worse off is hardly less speculative. It is extremely unlikely that a passing motorist would enter a burning car on the off chance that the occupants were still in it and if so were still alive, and it is even less likely that a passing motorist would have extinguished the fire. We cannot resolve these factual issues here; but the unlikelihood that the plaintiffs' decedents would have been saved by private persons if the state had not attempted to rescue them shows how artificial it is to argue that the defendants deprived the plaintiffs' decedents of their lives. If the defendants deprived the plaintiffs' decedents of anything it was of some right to competent rescue services. But, as we have been at pains to stress, there is no such right in the Fourteenth Amendment. Of all the forms of state oppression of the individual, that which consists of trying but failing to assist at accidents must rank very low. It is not "oppression" at all; it is essentially inaction; and it was remote from the concerns of the framers of the Fourteenth Amendment. Although there are many hazards of which the framers of the Fourteenth Amendment and the Civil Rights Act of 1971 could not have been aware, fire—a greater hazard in the nineteenth century than it is today—and accidents, and careless policemen, careless firemen, and careless medical workers, are not among them. What happened in this case is not the kind of thing that the framers were not concerned about because they could not foresee but the kind of thing they knew about and surely did not think required a federal tort remedy to prevent.

There is no reason for federal judicial intervention in a case like this. In some situations the incentives of state and local officials to provide effective and evenhanded aid and protection to their citizens may be distorted by politics or prejudice; but rescuing people from burning cars is not one of them. If local government does a bad job of providing police and fire protection, political retribution will come swift and sure; if elected state judges (Illinois judges are elected) do not provide evenhanded and effective tort remedies for local victims of auto accidents, their days in office may be numbered too. We need not fear that unless the federal courts intervene the type of incompetence alleged in these complaints will flourish unchecked by state law.

The Civil Rights Act of 1871 did not make every tort committed under color of state law actionable in federal court. *Paul v. Davis*, 424 U.S. 693, 699-701 (1976); *Baker v. McCollan*, 443 U.S. 137, 146-47 (1979); *Martinez v. California*, 444 U.S. 277, 285 (1980); *Parratt v. Taylor*, 451 U.S. 527 (1981). These cases and others we might cite are distinguishable but they express a mood to which we are obligated to pay respectful attention—a mood of concern lest state tort law be completely swallowed up by section 1983. The danger is acute here. In any traffic accident case—in any accident case—one can argue that the police, the firemen, and other public-safety workers should have done more to assist the accident victim. If the district court's decision were affirmed, many traffic accidents, especially single-car accidents, would become the subject of federal litigation. Section 1983 is not a mandate of highway safety.

We hold that an attempt by state officers to assist at an accident is not a deprivation of life without due process of law under the Fourteenth Amendment when the attempt fails because of the negligence or even gross negligence of the officers or their superiors, and the accident victim dies. The orders of the district court denying the defendants' motions to dismiss the complaint are therefore

—11a—

reversed and the cases are remanded with directions to dismiss the complaints for failure to state a claim under federal law.

A true Copy:

Teste:

*Clerk of the United States Court of
Appeals for the Seventh Circuit*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable Joseph Sam Perry

Cause No. 81 C 6518

Date August 23, 1982

James R. Jackson, etc. vs. City of Joliet, et al.

* * *

This cause comes on upon defendants' motion to dismiss the complaint herein. The court has read and considered said motion and the memoranda of the respective parties and finds that said motion should be denied for the reasons explicated in plaintiff's answering memorandum, but that the court should certify this order.

Accordingly, it is ORDERED that said motion to dismiss is denied; that this order denying said motion involves a controlling question of law as to which there is substantial ground for difference of opinion so that the court certifies that an immediate appeal from this order may materially advance the ultimate termination of the litigation; and that if an appeal is not taken timely, defendants shall answer said complaint within twenty days after the time for appeal has expired.

/s/ JOSEPH SAM PERRY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable Joseph Sam Perry

Cause No. 81 C 6519

Date August 23, 1982

Velva Ross, etc. vs. City of Joliet, et al.

* * *

This cause comes on upon defendants' motions to dismiss the complaint herein, one motion filed by defendants City of Joliet, Frederick Breen, L. Taylor, Lawrence Walsh, Dave Horn, Joe Speaker, Robert Kuban, William Tatro, Joe Walsh, and Larry Morris, the other motion filed by defendants County of Will and Robert Tezak, Coroner. The court has read and considered said motions and the memoranda of the respective parties and finds that said motions should be denied for the reasons explicated in plaintiff's brief, but that the court should certify this case.

Accordingly, it is ORDERED that said motions to dismiss are denied but that this order denying said motions involves a controlling question of law as to which there is substantial ground for difference of opinion so that this court certifies that an immediate appeal from this order may materially advance the ultimate termination of the litigation.

/s/ JOSEPH SAM PERRY

STATUTES INVOLVED

Ill. Rev. Stat. 1981, ch. 85, § 4-102

Neither a local public entity nor a public employee is liable for failure to establish a police department or otherwise provide police protection service or, if police protection service is provided, for failure to provide adequate police protection or service, failure to prevent the commission of crimes and failure to apprehend criminals. 1965, Aug. 13, Laws 1965, p. 2983, § 4-102.

Ill. Rev. Stat. 1981, ch. 85, § 5-103(b)

Except as provided in Section 1-4-4 of the "Illinois Municipal Code", approved May 29, 1961, as heretofore or hereafter amended,¹ and in Section 1 of "An Act in relation to the tort liability of firemen of fire protection districts or corporations", approved August 4, 1951, as heretofore or hereafter amended,² neither a local public entity nor a public employee acting in the scope of his employment, is liable for an injury caused by an act or omission of a public employee while engaged in fighting a fire. 1965, Aug. 13, Laws 1965, p. 2983, § 5-103.

¹ Chapter 24, § 1-4-4.

² Chapter 127½, § 46.

Office-Supreme Court, U.S.
FILED

DEC 29 1983

ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JAMES R. JACKSON, individually and as administrator of the estates of **Sandra A. Jackson**, deceased, and **Baby Boy Jackson**, deceased,

Petitioner,

v.

CITY OF JOLIET, et al.,

Respondents.

VELVA ROSS, individually and as administrator of the estate of **Jerry D. Ross, Jr.**, deceased,

Petitioner,

v.

CITY OF JOLIET, et al.,

Respondents.

VELVA ROSS, individually and as administrator of the estate of **Jerry D. Ross, Jr.**, deceased,

Petitioner,

v.

COUNTY OF WILL, a municipal corporation, and **ROBERT TEZAK**, Will County Coroner,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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IN THE
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JAMES R. JACKSON, individually and as administrator of the
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son, deceased,

Petitioner,

v.

CITY OF JOLIET, et al.,

Respondents.

VELVA ROSS, individually and as administrator of the estate of
Jerry D. Ross, Jr., deceased,

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v.

COUNTY OF WILL, a municipal corporation, and **ROBERT**
TEZAK, Will County Coroner,

Respondents.

On Petition For A Writ Of Certiorari To The United
States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, **CITY OF JOLIET**, **FREDERICK BREEN**, **L.**
TAYLOR, **ROBERT KUBAN**, **LAWRENCE WALSH**, **DAVE**
HORN, **JOE SPEAKER**, **WILLIAM TATRO**, **JOE WALSH**, and
LARRY MORRIS, respectfully pray that this Court deny

the Petition for a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Seventh Circuit entered in this case on August 23, 1983.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit is reported at 715 F.2d 1200 (7th Cir. 1983) and appears in Petitioners' Appendix at pages 1a-11a. The unpublished orders of the United States District Court for the Northern District of Illinois, Eastern Division, appear in Petitioners' Appendix at pages 12a-13a.

RESPONDENTS' STATEMENT OF THE CASE

The facts material to the consideration of the questions presented in the Petition are drawn from Petitioners' Complaints. Those facts, which are merely allegations at this stage of litigation, and which must be taken as true for the purpose of ruling on Respondents' motions to dismiss Petitioners' Complaints, were set forth by the Court of Appeals as follows:

"On November 21, 1980, at about 9:35 p.m. Jerry Ross, age 17, accompanied by Sandra Jackson, age 16, and six months pregnant, was driving on a road in Joliet, Illinois, when the car swerved off the road for unknown reasons, crashed, and burst into flames. Two minutes later a Joliet policeman, defendant Taylor, chanced on the scene. Although the car's

wheels were spinning, its lights were on, its motor was running, and it was burning, Taylor made no attempt to determine whether it was occupied and did not call an ambulance. He did call the fire department (at 9:40) and he then returned to the road and directed traffic away from the scene of the accident. Five Joliet firemen, also defendants, arrived eight minutes later. At 10:19, having put out the fire, they first noticed Ross and Jackson slumped in the front seat of the car. They made no attempt to remove or assist either one but they did call an ambulance, which arrived at 10:26. The firemen and ambulance paramedics thought Ross dead and left him in the car, but removed Sandra Jackson alive and took her to a hospital. She was admitted at 10:40 and pronounced dead, along with her fetus, at 10:55. Ross was later removed from his car by a tow-truck driver and pronounced dead by the county coroner (also a defendant) when the coroner arrived at 11:45.

The Plaintiffs (representing Ross, Jackson, and the fetus) allege that their decedents would have been saved if Taylor had aided the occupants of the burning car, or called an ambulance, or at least not directed traffic in a way that prevented other potential rescuers from saving them, or if the firemen had discovered the car was occupied before the fire was put out or at least had aided the occupants then. The coroner is a defendant in Ross's suit because he had issued a directive that no nonsupervisory personnel (such as the firemen who discovered Ross) were to touch a corpse unless someone from his office was present, and Ross may have been alive when they discovered him. The city's police and fire chiefs, and the city and county themselves, are additional defendants, but we shall not have to consider their liability separately, or decide whether a section 1983 suit can be maintained on behalf of a deceased six-month-old fetus. The complaints also contain pendent claims under state tort law but the plaintiffs concede as they

must that if their section 1983 claims are dismissed on the pleadings the pendent claims should also be dismissed. *United Mine Workers v. Gibbs*, 383 U.S. 715, 716 (1966).

Jackson, supra, 715 F.2d at 1201-02; Petitioners' Appendix at 2a-3a.

Petitioners' reference to Respondents' "reckless" conduct set forth in their Statement of the Case requires clarification. The Court of Appeals acknowledged that Petitioners' "complaints are liberally sprinkled with words like 'recklessly' and 'knowingly'" in describing Respondents' conduct toward their decedents. *Jackson, supra*, 715 F.2d at 1202; Petitioners' Appendix at 3a. However, upon the comments made by Petitioners' counsel at oral argument, the Court of Appeals indicated that Petitioners' Complaints allege "negligence," or at the most "gross negligence" on the part of Respondents. *Id.* at 1202; Petitioners' Appendix at 4a.

Respondents moved to dismiss Petitioners' Complaints for their failure to state a claim cognizable under Section 1983. The Federal District Court denied Respondents' dismissal motions but granted leave to Respondents to take an interlocutory appeal pursuant to 28 U.S.C. Section 1292(b) of its decision. On appeal, the Court of Appeals held that Petitioners' allegations failed to state a claim under federal law since "an attempt by state officers to assist at an accident is not a deprivation of life without due process of law under the Fourteenth Amendment when the attempt fails because of the negligence or even gross negligence of the officers or their superiors, and the accident victim dies. *Jackson, supra*, 715 F.2d at 1206; Petitioners' Appendix at 10a.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS' DETERMINATION THAT THE NEGLIGENT DEPRIVATION OF LIFE OR LIBERTY DOES NOT CONSTITUTE A VIOLATION OF SUBSTANTIVE DUE PROCESS IS CONSISTENT WITH THE DECISIONS OF THE SUPREME COURT AND OTHER COURTS OF APPEALS.

Petitioners have invited this Court to use the present case as a vehicle to clarify its decision in *Parratt v. Taylor*, 451 U.S. 321 (1981). Their invitation requires this Court to interpret *Parratt* as dictating that *all* negligent deprivations of life or liberty, regardless of the state remedies available to redress such deprivations, violate the Fourteenth Amendment's guarantee of substantive due process. To follow Petitioners' recommended interpretation of *Parratt* as an all-encompassing federal remedy for anyone injured by a state officer is surely the final step in transforming the Fourteenth Amendment into the "font of tort law" which this Court has repeatedly ruled the Fourteenth Amendment should not become. Thus, Petitioners' invitation to expand the body of federal tort law is one which this Court should not accept.

Parratt, which dealt with the negligent deprivation of an inmate's hobby kit, has little to do with the facts and the issues of law presented in this case. Under *Parratt*, a meaningful postdeprivation remedy under state law is sufficient to satisfy procedural due process when an individual is negligently deprived of property. *Id.* at 541. The present case has nothing to do with procedural due process or postdeprivation remedies or the loss of property. Rather, the Court of Appeals addressed the issue

of whether the negligent deprivation of life violates substantive due process, and it persuasively held that the negligent failure to rescue—like the negligent operation of a vehicle by a state officer—is not the stuff of which a federal civil rights claim is made. The reasoning and the ultimate holding of the Court of Appeals is unerringly consistent with the Supreme Court's decisions in *Paul v. Davis*, 424 U.S. 693 (1976), *Baker v. McCollan*, 443 U.S. 137 (1979), *Martinez v. California*, 444 U.S. 277 (1980), and, of course, *Parratt*.

Petitioners' assertion that "the circuits are split" on the issue of Section 1983 liability for the negligent deprivation of life is not substantiated by their citation to cases which purportedly conflict with the Court of Appeals' decision in the present case. Of the six cases cited in favor of Petitioners' contention at pages 5 and 6 of the Petition, four cases neither address nor make mention of a negligent deprivation of life as constituting a violation of substantive due process. One case, *Clark v. Taylor*, 710 F.2d 4 (1st Cir. 1983), cited by Petitioners expressly states that an individual defendant "cannot be liable under section 1983 for merely negligent failure to act," and it cites the case of *Procunier v. Navarette*, 434 U.S. 555 (1978), in support of the proposition. *Clark, supra*, 710 F.2d at 9. Petitioners' citation to *Hirst v. Gertzen*, 676 F.2d 1252 (9th Cir. 1982), in which the court held that a complaint alleging gross negligence in the care and supervision of an inmate states a cause of action under Section 1983, must be questioned in light of the Ninth Circuit's recent decision in *Haygood v. Younger*, 718 F.2d 1472 (9th Cir. 1983), which held that even assuming that *Parratt* applies to deprivations of life or liberty, Section 1983 does not provide a cause of action for an individual who has an adequate postdeprivation remedy at state law.

Apparently as an alternative to the theory for reversal offered on page 5 of the Petition, Petitioners present a rather incongruous argument in the first paragraph of page 6 of the Petition. Petitioners first cite this Court's recent decision in *Smith v. Wade*, U.S., 103 S.Ct. 1625 (1983), which permits an award of punitive damages for a prison guard's reckless or careless disregard or indifference to an inmate's rights or safety. The citation to *Smith*, which has nothing to do with issues of the present case, is neither explained by Petitioners nor comprehensible from the arguments presented before or after it. Then, Petitioners cite *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), so as to discuss the case "in a procedural due process context." Petitioners' oscillation between procedural and substantive due process in their Petition (and throughout the course of this litigation) demonstrates Petitioners' inability to articulate the gravamen of their Complaints against the police officers and firefighters of the City of Joliet. The issue relating to those public servants is whether they violated the decedents' rights to substantive due process by failing to rescue them from a burning car. The Court of Appeals held that the public servants' inaction—be it even negligent or grossly negligent—was not a violation of the Fourteenth Amendment. Petitioners' citation to *Logan* and reference to "procedural due process" offer nothing to demonstrate that the Court of Appeals' decision was inconsistent with controlling precedent established by this Court.

The Court of Appeals' decision follows existing case law. *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982), *Hull v. City of Duncanville*, 678 F.2d 582 (5th Cir. 1982), and *Reiff v. City of Philadelphia*, 471 F.Supp. 1262 (E.D. Pa. 1979), which are cited by the Court of Appeals, and the additional cases of *Wright v. City of Ozark*, 715 F.2d 1513

(11th Cir. 1983), *Dollar v. Haralson County, Georgia*, 704 F.2d 1540 (11th Cir. 1983), and *Todd v. White Lake Township*, 554 F.Supp. 272 (E.D. Mich. 1983), amply demonstrate that federal courts will not impose civil rights liability upon governmental personnel for their failure to perform an act which is not required by law. The practical considerations of holding otherwise were set forth in an exhaustive review by the Court of Appeals and present a persuasive argument for not transforming simple tort actions into civil rights actions. Every automobile accident, every fire, and every incident in which life becomes imperiled through no fault of governmental personnel will become, if Petitioners' position is accepted, the setting for a potential civil rights action and a trial on the complaint. A plaintiff need only allege that the attending governmental personnel failed to provide adequate emergency medical treatment (or breached a duty of care under the parlance of negligence law), and that allegation alone will ensure every plaintiff victimized by an automobile accident, fire, or other calamity of a trial on the merits of his or her civil rights claim. To permit such actions in federal court for the failure to render adequate medical treatment to persons who have imperiled themselves is to truly make the Fourteenth Amendment become the "font of tort law" for which it was not designed.

II.

THE SUPREME COURT NEED NOT ADDRESS THE ISSUE OF "WHETHER THE LACK OF AN ADEQUATE STATE REMEDY AFTER A DEPRIVATION OF LIFE OR LIBERTY VIOLATES PROCEDURAL DUE PROCESS."

Petitioners request that this Court permit a review of an issue that was not addressed by the Court of Appeals. That issue involves the adequacy of any postdeprivation

remedies that Petitioners may have in seeking recourse against Respondents in state court. Petitioners assert (although it is not clear in the argument on page 7 of the Petition) that procedural due process is satisfied if a state provides an adequate postdeprivation remedy for the aggrieved individual. As has become characteristic of Petitioners' arguments, Petitioners also engage in a discussion of substantive due process and the adequacy of a postdeprivation remedy. The sum and substance of Petitioners' argument are that they do not have an adequate remedy under Illinois law, and, therefore, this Court should find a cause of action against Respondents for violating procedural due process in failing to rescue their decedents.

The need for an advisory opinion on the issue Petitioners raise in Section I.B. of their Petition has not been expressed. This Court's attention need not be given to an issue that was not addressed by the Court of Appeals. Assuming *arguendo* this Court determined the issue to merit review, it must be noted that Petitioners have failed to set forth any explanation of how their state remedies are inadequate. Petitioners have merely cited (but not in Section I.B. of their Petition) two Illinois statutes, Ill.Rev.Stat. 1981, ch. 85, par. 4-102 and par. 5-103(b), and stated that both statutes cloak Respondents with "absolute immunity" from liability.

This issue hardly merits review. Petitioners did not raise the applicability of ch. 85, par. 5-103(b), in its appellate brief to the Court of Appeals. It should not be discussed by Petitioners at this late stage in litigation. Furthermore, those statutes do not cloak Respondents with "absolute" immunity. Finally, it appears incongruous for Petitioners to request this Court to review an issue that was neither briefed nor addressed at the trial court level

or in the Court of Appeals. This case was decided on the adequacy of Petitioners' Complaints in stating a cause of action under Section 1983 and not the adequacy of their state remedies. It is the decision of the Court of Appeals that should be Petitioners' concern and not what the Court of Appeals could have decided.

III.

THE SUPREME COURT NEED NOT ADDRESS THE ISSUE OF "WHETHER RECKLESS PERFORMANCE OF GOVERNMENTAL SERVICES AFTER PERFORMANCE BEGINS VIOLATES DUE PROCESS."

Again, Petitioners request this Court to review an issue that was neither briefed nor addressed in the Court of Appeals. That new issue apparently involves Respondents' "reckless" performance of services once they discovered Petitioners' decedents in the burning car. Petitioners cite page 1205 of the reported decision of the present case where the Court of Appeals purportedly held that "a municipality can never be liable for reckless performance of governmental services after performance begins."

A word by word analysis of page 1205 fails to reveal either an express or implicit holding that "a municipality can never be liable for reckless performance of governmental services after performance begins." To find such a holding offered by Petitioners is truly an act of legal alchemy.

Petitioners' magical powers aside, the issue that Petitioners now raise in Section I.C. of their Petition was not before the Court of Appeals and does not now merit review by this Court. The purported "split in the Circuits" must wait for another day for its review by the Supreme Court.

IV.

**THERE ARE NO SPECIAL OR IMPORTANT REASONS
REQUIRING SUPREME COURT REVIEW OF THIS
CASE.**

Petitioners assert that the importance of Section 1983 case law and the divergent opinions that result thereunder provide cause for review of the decision of the Court of Appeals. The "divergent opinions" which Petitioners alleged to exist in Section I of its Petition were refuted in Respondents' brief. Petitioners' impassioned plea to this Court to "prevent the address of the courthouse from being the determinative factor" of the outcome of a civil rights case appears to be hyperbole when it is realized that "divergent opinions" on the outcome of this case do not exist. Disagreements abound in the body of federal civil rights law, but this case does not involve any of those disagreements. A constitutional mandate to rescue people from burning cars is not the kind of issue that would evoke a diversity of opinions from the judiciary. All nobility aside, the Fourteenth Amendment should not become a Good Samaritan law.

CONCLUSION

Because there are no special or important reasons for reviewing this case, the Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

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